

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

IN RE GENETICALLY MODIFIED)	4:06 MD 1811 CDP
RICE LITIGATION)	ALL CASES

**PROPOSAL OF DEFENDANTS' LEAD COUNSEL FOR
CASE MANAGEMENT ORDER NO. 9**

Lead counsel for Plaintiffs and the Bayer Defendants have met and conferred in good faith to formulate a Scheduling Order and Trial Plan for consideration by this Court. Counsel have agreed that this litigation should proceed with "test" or "bellwether" trials of Producer Cases involving a limited number of selected plaintiffs in each trial. They have further agreed that such trials should commence in November 2009. Although the parties have not reached agreement on a Scheduling Order, many of the proposed dates are close to one another.

Lead counsel, despite good faith negotiations, have not been able to reach agreement on the basic elements of a trial plan or procedures for discovery in all pending cases. Each proposes a plan with substantially different core elements, such that the component parts are not directly comparable and are not interchangeable. Thus, unlike with prior joint reports, counsel cannot set out competing terms for the Court to choose between and still maintain the basic integrity of the respective trial plans. As a result, Lead Counsel for each side will present a separate plan for the Court's consideration.

Bayer Defendants' Trial Plan

The Bayer Defendants propose a trial plan that 1) establishes procedures and deadlines for selecting a representative sample of Producer Plaintiffs for initial "test case" trials in this MDL proceeding and, 2) sets deadlines for discovery in all cases of Producer and Non-Producer

Plaintiffs to allow for trial before this Court or, in cases transferred here from other federal jurisdictions by the JPML, remand to those jurisdictions for trial.

The basic structure of the Bayer Defendants' proposed trial plan is to identify the states from which a sufficient number of plaintiffs have cases that can be tried in the Eastern District of Missouri, select a group of plaintiffs from each of those states for inclusion in the "Initial Trial Pool," and then prepare those cases for trial with full fact and expert discovery. Then, with the information learned about the plaintiffs, two of the plaintiffs from each state—one chosen by Plaintiffs, the other by the Bayer Defendants—are selected for the first trials, with trial on the other cases in the Initial Trial Pool taking place shortly after the first trials of plaintiffs from each state. At the same time, basic discovery—the Plaintiff Fact Sheet with the four limited document requests—is obtained from all other plaintiffs so that information learned from the first trials can be applied to the remainder of the pending plaintiffs.

The Bayer Defendants' proposed trial plan is designed to maximize efficiency and the information learned from these first trials. Each side gets to pick plaintiffs that they view as representative so that the outcomes of the first trials will provide each side with meaningful insight into how the differing claims and defenses are resolved. The trial plan provides for a limited number of plaintiffs in each case so that more reliable and distinctive data points may be learned from each case. In addition, the trial plan maximizes the likelihood that the test trials will proceed to verdict and not be frustrated by numerous and untimely dismissals. For the plaintiffs not selected for the first trials, the trial plan provides for discovery and resolution of pretrial issues in a consistent and efficient manner so that these cases can be promptly tried upon remand.

Plaintiffs' proposed trial plan does not contain many important elements. Most importantly, by not according Defendants any input into which of the plaintiffs are selected for trial in these first "test cases," these cases would not be representative of the hundreds of plaintiffs with pending lawsuits, but rather would reflect those chosen by plaintiffs for their own reasons. Also by deferring all document discovery in all other cases for many months, the Bayer Defendants would be prevented from obtaining the information necessary to perform even a rudimentary evaluation of individual plaintiffs' claims. Finally, by placing a fewer number of plaintiffs in the trial pool, Plaintiffs' proposed trial plan is vulnerable to additional delay arising from dismissals by any of these individual plaintiffs. In other MDL cases where test cases are set for trial from a larger pool of plaintiffs, counsel for the Bayer Defendants have had many plaintiffs dismiss their cases rather than proceed to trial. Under Plaintiffs' proposal, such dismissals would require restarting the clock, as new plaintiffs must be selected for full discovery, expert discovery, and trial.

For the Non-Producer cases, the Bayer Defendants agree that the deadlines in those cases should generally trail the deadlines for the initial trial pool cases by four (4) months. In addition, the Bayer Defendants believe that this Court should oversee discovery and decide all pretrial motions in all cases so that the legal issues which will be common to all cases may be resolved consistently and efficiently.

A proposed Case Management Order is attached to this Proposal as Exhibit 1.

Respectfully submitted,

FOX GALVIN, LLC

By: /s/Terry R. Lueckenhoff
Terry R. Lueckenhoff, #43843
One South Memorial Drive, 12th Floor
St. Louis, Missouri 63102
(314) 588-7000
(314) 588-1965 (Fax)
tlueckenhoff@foxgalvin.com

Attorney for the Bayer Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Terry R. Lueckenhoff

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[PROPOSED] CASE MANAGEMENT ORDER NO. 9

A. *Lexecon* Waiver

1) Procedure for Waiver.

In order to increase the number of potential trial pool plaintiffs from each of the five (5) rice growing states, all Producer Plaintiffs whose actions were transferred into this District by the JPML must inform Lead Counsel for Plaintiffs and Defendants, on or before **October 23, 2008**, if they are willing to waive the requirements of *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) to permit trial in this District. These Producer Plaintiffs must refile their actions in the Eastern District of Missouri by **November 13, 2008**, and dismiss their earlier actions contemporaneously.

So long as these refiled actions contain identical parties and claims to those presently pending, the Bayer Defendants have stipulated and agreed that they will not assert any objection of improper venue pursuant to Fed. R. Civ. P. 12(b) as to any Producer cases related to LLRICE filed directly in the Eastern District of Missouri that emanate from districts outside the Eastern District of Missouri and that would appropriately be included in this multidistrict litigation procedure. In addition, for such cases, the Bayer Defendants agree and stipulate that any prescription or limitations period will be measured by the date of filing of the original suit. This agreement does not act as an acknowledgment that any prescriptive or limitations period may or

may not have run prior to the filing and the Bayer Defendants specifically reserve the right to assert that any such period already accrued.

2) Potential Trial Pool Plaintiffs.

All of those Producer Plaintiffs who either filed suit in this District or who agree to waive *Lexecon* by following the procedure set forth above will be called “Potential Trial Pool Plaintiffs.”

B. Plaintiff Fact Sheets

1) Fact Sheets to be Completed by All Producer Plaintiffs.

Plaintiff Fact Sheets, including responses to the four document requests, shall be completed by all Producer Plaintiffs with cases pending in this Court as of **October 1, 2008**, by **November 20, 2008**. Producer Plaintiffs who are transferred to this Court after **October 1, 2008**, shall complete the Plaintiff Fact Sheet and respond to the four document requests within 60 days of transfer to this Court. Producer Plaintiffs who have dismissed and refiled in order to waive *Lexecon* shall have their compliance with this provision measured by their original date of filing.

2) Deficiencies in Plaintiff Fact Sheets.

On or before **December 14, 2008**, Defendants shall identify deficiencies in Plaintiff Fact Sheets received by November 20, 2008.

3) Cure of Deficiencies in Plaintiff Fact Sheets.

Plaintiffs shall cure any such deficiencies by **February 19, 2009**. Producer Plaintiffs who do not, without a showing of good cause, substantially complete Plaintiff Fact Sheets after notice of deficiency will have their cases subject to dismissal with prejudice, after an opportunity for hearing.

C. Selection of Initial Trial Pool

1) Selection of Trial Pool Plaintiffs.

The parties will select “Trial Pool Plaintiffs” from the Potential Trial Pool Plaintiffs. For each state from which at least thirty (30) Producer Plaintiffs are available for trial in this District, ten (10) plaintiffs will be selected from that state and placed in the “Trial Pool.”

2) Initial Trial Pool Selection.

Plaintiffs and Defendants shall each select from the Potential Trial Pool Plaintiffs five Producer Plaintiffs who are domiciled in each of the states from which a trial will be conducted in this District for inclusion into the “Initial Trial Pool.” All Potential Trial Pool Plaintiffs who are not selected will become “Other Producer Plaintiffs.” If a Plaintiff selected for an initial Trial Pool is joined in an action with other Plaintiffs, then the selected Plaintiff’s action shall be severed and shall proceed as a separate case. Lead Counsel shall exchange their respective lists of Producer Plaintiffs to be included in the Initial Trial Pool, by email, at 4:00 P.M. Central Time on **December 11, 2008**. In their exchange, Lead Counsel shall identify each Plaintiff by full name, full case caption, MDL case number, and transferor court and case number (if applicable) or Eastern District of Missouri case number (for cases filed in this District).

3) Amendment to Complaint and Answer.

Plaintiffs selected for the initial Trial Pool must file any Amendment to their Complaint no later than **December 31, 2008**. Defendants shall file their Answer or other responsive pleading to the Complaint no later than **January 30, 2009**.

4) Dismissal of Cases from Initial Trial Pool within Thirty (30) Days.

Once a Plaintiff has been selected for the Initial Trial Pool by any party, any dismissal of that Plaintiff within thirty (30) days of selection shall entitle the party selecting the Plaintiff to select a replacement Plaintiff. The replacement Plaintiff shall be selected (and notification given to opposing Lead Counsel as provided above) within ten (10) business days of the dismissal. Failure to select a replacement Plaintiff and to notify opposing Lead Counsel of such selection within ten (10) business days will constitute a waiver of the right to select a replacement Plaintiff.

5) Dismissal of Cases from Initial Trial Pool after Thirty (30) Days.

The intent of this Order is that Lead Counsel for Plaintiffs and Defendants shall have an equal opportunity to select cases for case-specific expert discovery and for the initial trials in this Court. To maintain that equality, if a Defendants' Selection Plaintiff dismisses his or her case more than thirty (30) days after selection, that dismissal shall be with prejudice, unless ordered otherwise by the Court. Upon dismissal, Defendants may (but need not) remove one of the Plaintiffs' Selections from the Initial Trial Pool.

D. Schedule For Initial Trial Pool Plaintiffs

The following deadlines and procedures apply to all Initial Trial Pool Plaintiffs and are set with the expectation that the first trial of Initial Trial Pool Plaintiffs will take place in November, 2009.

1) Additional Discovery.

On or before **December 19, 2008**, Defendants shall serve any additional discovery requests on Initial Trial Pool Plaintiffs, including Notices of Deposition. All Responses, whether to Interrogatories, Requests for Admission, or Requests for Production, shall be served by **February 5, 2009**. Depositions may continue until the end of fact discovery for Initial Trial Pool Plaintiffs.

2) Pretrial Deadlines.

Expert Disclosures for experts designated by the Initial Trial Pool Plaintiffs shall be served by **March 12, 2009**. Fact Discovery related to trials of claims of the Initial Trial Pool Plaintiffs shall be completed by **March 12, 2009**. Experts designated by the Initial Trial Pool Plaintiffs shall be deposed by **April 9, 2009**. Defendants' Expert Disclosures shall be served by **May 7, 2009**. Experts designated by Defendants in the Initial Trial Pool cases shall be deposed by **June 4, 2009**. Plaintiffs' Rebuttal Expert Disclosures, if any, shall be served by **June 25, 2009**. Plaintiffs' Rebuttal Experts shall be deposed by **July 23, 2009**. All Discovery shall close on **July 23, 2009**.

3) Selection of Cases for Initial Trials.

Two plaintiffs from each state represented in the Initial Trial Pool will be selected for trial on **August 1, 2009**. One such plaintiff shall be selected by the Bayer Defendants from the plaintiffs designated by them for inclusion in the Initial Trial Pool and the other such plaintiff

shall be selected by Plaintiffs from the plaintiffs designated by them for inclusion in the Initial Trial Pool. The Court shall set the order in which these cases will be tried. The first trial of these two plaintiffs from the same state will commence in November, 2009 and shall be followed shortly by a trial from plaintiffs from the next state shortly thereafter and continue until all states represented in the trial pool have had cases tried.

4) Dispositive and *Daubert* Motions.

For those plaintiffs set for the first trials from their states, Dispositive and *Daubert* Motions shall be served by **August 13, 2009**. Responses shall be served by **September 10, 2009**. Replies shall be served by **October 1, 2009**.

5) Trial of Remaining Initial Trial Pool Plaintiffs.

Counsel shall meet and confer promptly after the selection of cases for initial trials to determine the order and number of plaintiff in subsequent trials.

E. Discovery From Other Producer Plaintiffs

Discovery shall be stayed in the Other Producer Plaintiff cases until **February 26, 2009**. After that date, the Parties shall proceed with fact discovery from Plaintiffs to prepare these cases for trial or remand. Fact Discovery in all other cases transferred to this Court by October 1, 2008 shall be completed by **November 19, 2009**. The Parties shall meet and confer and propose a plan for selection, ordering, expert disclosure, and dispositive motions for additional plaintiffs by **February 12, 2009**.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this ___ day of October, 2008.